Supreme Court, U.S.
FILED

(1) 02 859 DEC 3 2002

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No. ——

In The
Supreme Court of the United States

R. SCOTLUND VAILE,

Petitioner,

versus

CISILIE A. PORSBØLL f/k/a CISILIE A. VAILE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

1. Did the Supreme Court of Nevada have jurisdiction to make a determination under The International Child Abduction Remedies Act and the Hague Convention on the Civil Aspects of International Child Abduction that children had been wrongfully removed?

2. If the Supreme Court of Nevada had such jurisdiction, did it err in failing to apply the law of Norway in making that determination?

3. Did the making of this determination in the first instance by an appellate court deny the petitioner due process, where (1) the trial court did not hold an evidentiary hearing on the issue and had declined to make a determination; and (2) the appellate court had not been asked to make the determination?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	8
REASONS FOR GRANTING THE WRIT	13
I. The Supreme Court of Nevada Lacked Jurisdiction Under the Hague Convention on the Civil Aspects of International Child Abduction to Decide the Issue of Wrongful Removal of the Children Because the Children Never Lived in Nevada	13
A. This Court Has Never Construed Any Aspect of This Treaty	13
B. Background on the Treaty Framework	13
C. Nevada Lacked Subject Matter Jurisdiction to Decide the Abduction Issue Under the Hague Convention and the ICARA	15
D. Review is Necessary to Resolve a Split of Authority and to Enforce the Intent of Congress	17
II. Even if Nevada Has Jurisdiction, The Nevada Supreme Court Misapplied the Hague Convention and the ICARA in Deciding the Abduction Issue	19

TABLE OF CONTENTS – Continued

Page

III. The Supreme Court of Nevada Denied Scotlund Due Process by Making the Hague Determination in the First Instance 22

A. The ICARA Clearly Incorporates Due Process Protections 22

B. The Lower Courts are Divided on the Extent of the Hearing Required..... 24

CONCLUSION 26

APPENDICES

Opinion of the Supreme Court of Nevada A1

Writ of Mandamus of the Supreme Court of Nevada..... B1

Order of the District Court of Clark County, Nevada C1

Order Denying Rehearing..... D1

Department of State Letter of Submittal and Legal Analysis President's Letter of Transmittal and Legal Analysis E1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) 23

Diorinou v. Mezitis, 237 F.3d 133 (2nd Cir. 2001) 18

Egervary v. Rooney, 80 F. Supp. 2d 491 (E.D. Pa. 2000) 22, 23, 24

Flores v. Contreras, 981 S.W.2d 246 (Tex. App. – San Antonio 1998, no pet.) 14

Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) 14

Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685 (E.D. Va. 2002) 18

Holder v. Holder, 305 F.3d 854 (9th Cir. 2002) 18

Hollingsworth v. Hill, 110 F.3d 733 (10th Cir. 1997) 22

Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985) 22

In re Prevot, 59 F.3d 556 (6th Cir. 1995) 19

Jordan v. Jackson, 15 F.3d 333 (4th Cir. 1994) 22

Kemp v. G.D. Searle & Co., 103 F.3d 405 (5th Cir. 1997) 17

Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454 (1989) 22

Klam v. Klam, 797 F. Supp. 202 (E.D. N.Y. 1992) 23, 24

Lops v. Lops, 140 F.3d 927 (11th Cir. 1998) 14, 18

Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983) 22

March v. Levine, 249 F.3d 462 (6th Cir. 2001) 14, 24, 25

Miller v. Miller, 240 F.3d 392 (4th Cir. 2001) 18

Ohlander v. Larson, 114 F.3d 1531 (10th Cir. 1997) 18

TABLE OF AUTHORITIES – Continued

Page

Peralta v. Heights Med. Ctr., 485 U.S. 80 (1988).....24

Robison v. Via, 821 F.2d 913 (2nd Cir. 1987).....22

Vaile v. Eighth Judicial District Court, 44 P.3d 506 (Nev. 2002).....1, 20, 21

Velez v. Mitsak, No. 08-01-00246-CV, 2002 Tex. App. LEXIS 6251 (Tex. App. – El Paso August 29, 2002, n.p.h.).....23, 24

Your Insurance Needs Agency, Inc. v. United States, 274 F.3d 1001 (5th Cir. 2001).....17

Other Authorities

Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,493, 10,498 (app. B) (March 26, 1986).....7, 13, 20, 25

Jennifer Rauch, Comment: *Child Custody Rights: Should Airlines Be Allowed To Interfere?* 66 J. Air L. & Com. 403 (2000).....26

NRS 125A.050(1).....15

28 U.S.C. §1738A.....23

42 U.S.C. §11601 (1988).....1, 4, 13, 14

42 U.S.C. §11603 (1988).....*passim*

42 U.S.C. §11605 (1988).....24

Uniform Child Custody Jurisdiction Act, U.C.C.J.A. §205.....23

U.S. CONST. AM. V.....7, 22

OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reported at 44 P.3d 506 (Nev. 2002) and is reprinted as Appendix A to this Petition. The memorandum opinion and order of the district court is unreported and is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The opinion and writ of mandamus of the Supreme Court of Nevada was issued on April 11, 2002. The Supreme Court of Nevada denied rehearing by order dated September 5, 2002. This petition is filed within ninety days of that date as required by 28 U.S.C. §2101(c). Sup. Ct. R. 13.1.

This Court has jurisdiction to review the judgment and opinion of the Supreme Court of Nevada pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The International Child Abduction Remedies Act states, in relevant part:

§ 11601. Findings and declarations

(a) Findings. The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations. The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

§ 11603. Judicial remedies

(a) Jurisdiction of the courts. The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions. Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice. Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case. The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) Burdens of proof.

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

42 U.S.C. §§ 11601, 11603 (1988).

The Hague Convention on the Civil Aspects of International Child Abduction states, in relevant part:

Article 3

The removal or the retention of a child is to be considered wrongful where –

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a. 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b. 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration

of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units –

a. any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

b. any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature*, Oct. 25, 1980, arts. 3, 4, 5, 12, 14, 15, 31, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,493, 10,498 (app. B) (March 26, 1986)

The Constitution of the United States of America states, in relevant part:

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. AM. 5

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .

U.S. CONST. AM. 14 §1

STATEMENT OF THE CASE

R. Scotlund Vaile and Cisilie A. Vaile were married in Salt Lake City, Utah, on June 6, 1990. (A2). Their two children that are the subject of this action, Kaia Louise Vaile and Kamilla Jane Vaile, were born in Ohio in 1991 and 1995, respectively. (A3). Cisilie is a citizen of Norway and was at all relevant times a permanent resident of the United States. (App.4, Ex.1-I). Because of their parents' nationalities, the children enjoy dual Norwegian and United States citizenship. (Supp. App. Ex.F-2). The children lived in Ohio until late 1997, when the family temporarily moved to London, England, where Scotlund's employer had transferred him. (A3).

In the spring of 1998, the couple agreed to divorce. Fearing Scotlund would take the children to the United States, Cisilie turned to the British courts, which temporarily enjoined the parties from removing the children from the United Kingdom. (A3). However, the parties soon entered an extensive written agreement, which called for the parties to obtain a divorce in Las Vegas, Nevada. (A3). Scotlund was already registered to vote in Nevada, had his driver's license there, and had stored belongings there while traveling abroad. (Tr. 20-22). He also had declared Nevada his residence on his previous federal income tax return. (TR. 31-32).

The written agreement settled all matters of property, custody and visitation. It granted Cisilie primary custody until the children reached the age of ten, and then gave Scotlund primary custody for one year, followed by one more year of Cisilie's primary custody, and after which the children would be allowed to choose a parent with which to live. (App. 2, Ex. 15-1, p.7). There is a residency restriction

that required the custodial parent to live in the United States in one of seven designated metropolitan areas across the country, or in any other place agreed to by the parties. (App. 2, Ex. 15-1, p. 9). However, it allowed the children to live temporarily with Cisilie in Norway until Scotlund arranged for a residence in the United States and their transportation there. (App. 2, Ex. 15-1, p. 10). A separate written agreement was made in the Norwegian language at the same time, in which the parties broadly agreed to joint custody and to the jurisdiction of the Nevada Court. (*See* Supp. App. Ex. F).

After making the written agreement, Cisilie took the children to Norway. Scotlund went to Nevada.

Scotlund and Cisilie obtained an agreed divorce in Las Vegas, Nevada on August 10, 1998. (A4; Supp. App. Ex. A). The divorce incorporated all the terms of the parties' written agreement. In November 1999, Scotlund informed Cisilie that he intended to reside in Las Vegas and asked Cisilie to relocate there with the children pursuant to their agreement. (A4-5; App. v.1, p.6). However, Cisilie changed her mind about returning to the United States, and retained the children in Norway in violation of her agreement and the Nevada court order incorporating it. (A5). She filed an action in Norway to domesticate the Nevada order and modify it. (A5).

On April 11, 2000, the Nevada district court held Cisilie in contempt for failing to return the children from Norway, and granted primary custody to Scotlund. (A5; Supp. App. Ex. C). Scotlund thereafter took possession of the children in Norway, and returned with them to live in Texas. (A6). His action violated no existing court order, and was in full compliance with the parties' agreement

and the Nevada court order. However, the Norwegian court entered an order attempting to enjoin the removal of the children after the fact. (A6; App. v.1, Ex.1-P). Scotlund entered an appearance to contest the Norwegian court's jurisdiction after he had already left with the children. (A5).

Cisilie then responded to the Nevada contempt order, alleging that Nevada lacked subject matter jurisdiction because the parties had never resided there. She also sought return of the children under the Hague Convention on the Civil Aspects of International Child Abduction, alleging that a Norwegian court had assumed jurisdiction of the parties, and that Scotlund had kidnapped the children from Norway to bring them to Texas. (A6-7; App. v.1, Ex. 1-T).

In the meantime, Scotlund filed a custody suit in Texas, where he and the children actually lived. (A39; App. v.1, Ex. 1-U). Cisilie responded to contest the Texas court's jurisdiction. (A15; App. v.1, Ex. 1-V).

The Nevada district court conducted an evidentiary hearing, but refused to hear issues related to Cisilie's Hague Convention petition. Instead, the court limited the hearing to the issue of the parties' residence, for the purpose of determining whether it had jurisdiction. (Tr. 4, 47). On October 25, 2000, the Nevada district court entered extensive findings of fact and conclusions of law, which included the following:

1. R. Scotlund Vaile had established his legal residence in Nevada prior to obtaining the divorce, and did not attempt to defraud the court;

2. Cisilie Vaile was not under duress when she agreed to the divorce; she accepted its benefits

and caused it to be domesticated in Norway; therefore she was judicially estopped from contesting it;

3. The Nevada court never had jurisdiction over the children, because they were never present in Nevada, but it had jurisdiction over Scotlund and Cisilie and authority to control their conduct under a contract theory;

4. The Nevada court would exercise emergency jurisdiction over the children until another court assumed jurisdiction and relieved Nevada of responsibility; the court ordered surrender of the children's passports, and ordered them to remain in Texas until another court assumed jurisdiction; and

5. The Nevada court advised the courts in Texas and Norway to speak to each other.

(C5; App. v.3, Ex. 30).

On November 9, 2000, the Norwegian trial court dismissed the pending case there, ruling that the children were not domiciled in Norway, but were there only temporarily pursuant to the parties' agreement and the Nevada divorce decree. (A28; Supp. App. Ex. F). The Norwegian court expressly upheld the validity of the parties' agreement, in addition to noting the Nevada court order (Supp. App. Ex. F).

Cisilie sought review of the Nevada district court order by petition for writ of mandamus to the Supreme Court of Nevada. On April 11, 2002, a divided Nevada Supreme Court issued an opinion holding that the Nevada divorce decree was voidable for want of personal and subject matter jurisdiction, but that Cisilie was judicially

estopped from setting aside the divorce, because, *inter alia,* she had relied on it in moving the children to Norway. (A14-15). However, the majority also concluded that the child custody and visitation provisions were void for want of subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act. (A18). The majority also held that the district court erred in failing to make a determination of the children's habitual residence under the Hague Convention, and proceeded to hold, as a matter of law, that Norway was the children's habitual residence. (A24-25). The Supreme Court issued a writ of mandamus directing the district court to vacate its orders and to order the children returned to Cisilie for return to Norway. (B1-2).

Two separate dissenting opinions argued that the decree was void in its entirety, that the Nevada courts also lacked subject matter jurisdiction to make a determination of the children's habitual residence under the Hague Convention, and that the majority erred in making such a determination. (A31, 38).

Scotlund filed a motion for rehearing, in which he alleged that the Supreme Court of Nevada lacked subject matter jurisdiction to make a determination under the Hague Convention, and complaining that he had been denied the evidentiary hearing that was required before such a determination could be made. The Nevada Supreme Court denied the motion, with the same two justices dissenting. (D1).

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Nevada Lacked Jurisdiction Under the Hague Convention on the Civil Aspects of International Child Abduction to Decide the Issue of Wrongful Removal of the Children Because the Children Never Lived in Nevada

A. This Court Has Never Construed Any Aspect of This Treaty

This appeal involves the Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature*, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 51 Fed. Reg. 10,493, 10,498 (app. B) (March 26, 1986) (hereinafter "Hague Convention"), which the United States has implemented by enacting the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§11601-11610 (1988).

This Court has never addressed any issue under the Hague Convention or ICARA.

B. Background on the Treaty Framework

The Hague Convention was adopted by the signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble.

Under the Hague Convention, each country has a Central Authority which is responsible for discharging the duties imposed by the Convention and cooperating with

the Central Authorities of other countries to secure the return of children. Hague Convention, arts. 6, 7. Article 1 of the Convention states two objectives:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Hague Convention, art. 1.

Courts have also acknowledged a separate purpose of deterring parents from crossing borders in search of a more sympathetic court. *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996). The Hague Convention and the ICARA were specifically designed to discourage those who would remove or retain children in the hopes of seeking a "home court advantage" by ensuring that children wrongfully removed or retained would be returned to their place of habitual residence so that custody determinations are made there. *March v. Levine*, 249 F.3d 462, 472 (6th Cir. 2001).

To achieve these objectives, both the Hague Convention and the ICARA grant jurisdiction to decide only the abduction claim, not the merits of any underlying custody dispute. Hague Convention, art. 3; 42 U.S.C. §11601(b)(4) (1988); *Lops v. Lops*, 140 F.3d 927 (11th Cir. 1998); *Friedrich*, 78 F.3d at 1063; *Flores v. Contreras*, 981 S.W.2d 246, 248 (Tex. App. – San Antonio 1998, no pet.). The ICARA grants both state and federal courts concurrent jurisdiction over disputes under the Hague Convention. 42 U.S.C. §11603(a) (1988).

Under the ICARA, a petitioner must establish by a preponderance of the evidence that her children were wrongfully removed or retained in breach of her custody rights under the laws of the Contracting State in which the children habitually resided before they were removed or retained. Hague Convention, arts. 3, 12; 42 U.S.C. § 11603(e)(1)(A). Once wrongful removal is shown, the children must be returned. Hague Convention, art. 12. However, a court is not bound to order return of the children if the respondents establish certain exceptions under the treaty by clear and convincing evidence. Hague Convention, art. 13; 42 U.S.C. §11603(e)(2)(A).

C. Nevada Lacked Subject Matter Jurisdiction to Decide the Abduction Issue Under the Hague Convention and the ICARA

The majority and both dissenting opinions of the Supreme Court of Nevada each agreed that the Nevada district court lacked subject matter jurisdiction to grant the divorce because Scotlund and Cisilie had failed to establish residency under state law. The majority concluded that the decree was merely voidable, not void, and that Cisilie was judicially estopped from setting aside the divorce, because, *inter alia,* she voluntarily agreed to the false jurisdictional facts, and had relied on the decree in remarrying and moving the children to Norway. (A14-15). The two dissenting opinions would have held that the decree was void. (A29, 32). The majority did conclude that the child custody and visitation provisions were void for want of subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act. NRS 125A.050(1). (A18).

The majority then held that the district court erred in failing to make a determination of the children's habitual

residence under the Hague Convention, and proceeded to hold, as a matter of law, that Norway was the children's habitual residence. (A23-25). In concluding that it had jurisdiction to make this determination, the majority opinion states:

> First, we note that Nevada has jurisdiction to make the determination. The United States Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). [footnote omitted] Under both the Convention and ICARA, an aggrieved party may institute judicial proceedings in the country to which the children have been removed. [footnote omitted] State and federal courts have concurrent jurisdiction over such disputes. [footnote omitted]

(A21).

The majority erred in reaching this conclusion. The granting of concurrent jurisdiction to state and federal courts does not give a petitioner under the Hague Convention the complete discretion to file her petition anywhere in the United States. The ICARA specifically states:

> Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

42 U.S.C. §11603(b).

It is undisputed that the children were located in Texas at the time Cisilie filed her Hague Convention petition in Nevada. (A16-17). It is also undisputed that the children were never located in Nevada. (A17). The Nevada court lacked jurisdiction to entertain the petition because it is not "authorized to exercise its jurisdiction in the place where the child[ren are] located at the time the petition [was] filed." 42 U.S.C. §11603(b). The Nevada Supreme Court erred in holding that an aggrieved party may institute judicial proceedings anywhere "in the country to which the children have been removed" for the simple reason that courts in the United States (other than this Court) do not have nationwide jurisdiction. Cisilie's petition under the Hague Convention should have been filed and heard in either a Texas district court or the United States District Court for the Northern District of Texas.

Both of the dissenting opinions correctly concluded that the court lacked jurisdiction to make the Hague Convention determination because the children were never in Nevada. (A31, 38).

D. Review is Necessary to Resolve a Split of Authority and to Enforce the Intent of Congress

Decisions to assume subject matter jurisdiction are reviewed *de novo, see, e.g., Your Insurance Needs Agency, Inc. v. United States*, 274 F.3d 1001, 1003 (5th Cir. 2001), as are questions of statutory interpretation. *See, e.g., Kemp v. G.D. Searle & Co.*, 103 F.3d 405, 407 (5th Cir. 1997). This court should undertake a *de novo* review of the Nevada Supreme Court's interpretation of the ICARA and its assumption of jurisdiction thereunder, because doing so

is necessary to resolve a division of lower court authority and to enforce the clearly-expressed intent of Congress.

Some courts have correctly treated section 11603(b) of the ICARA as a limit on the court's subject matter jurisdiction. *Ohlander v. Larson*, 114 F.3d 1531, 1539 n.7 (10th Cir. 1997); *Hazbun Escaf v. Rodriquez*, 191 F. Supp. 2d 685, 691 (E.D. Va. 2002); *see also Diorinou v. Mezitis*, 237 F.3d 133, 136 (2nd Cir. 2001) (noting, without comment, that the district court treated it as jurisdictional). Two other circuits have described it as a test for personal jurisdiction over the children. *Holder v. Holder*, 305 F.3d 854, 869 (9th Cir. 2002); *Lops v. Lops*, 140 F.3d 927, 937 (11th Cir. 1998). At least one federal court has called it a venue provision. *Miller v. Miller*, 240 F.3d 392, 397 (4th Cir. 2001); *see also Holder*, 305 F.3d at 869 (noting another, unpublished district court case that called it a venue provision).

While the Nevada Supreme Court correctly treated the statute as conferring subject matter jurisdiction, it conflicted with every one of the foregoing authorities in concluding that it conferred nationwide jurisdiction. It's decision to assume jurisdiction in this case sets a dangerous precedent because it will condone forum shopping, if not encourage it, by allowing a Hague Convention petition to be filed anywhere in the United States. It would indeed be ironic if a Convention whose purpose is to prevent forum shopping in child custody matters were construed to encourage forum shopping on the issue of child abduction. Granting this petition is necessary to enforce the clear intent of the ICARA.

II. Even if Nevada Has Jurisdiction, The Nevada Supreme Court Misapplied the Hague Convention and the ICARA in Deciding the Abduction Issue

Even if the Nevada courts had jurisdiction under the Hague Convention, the Nevada Supreme Court misapplied the treaty and the ICARA in ordering the children returned to Norway.

Under the ICARA, a petitioner must establish by a preponderance of the evidence that (1) he or she had lawful custody rights to the child when the child was wrongfully removed; (2) the child was wrongfully removed or retained from his or her habitual residence; and (3) at the time of removal, those custody rights were actually exercised. Hague Convention, arts. 3, 12; 42 U.S.C. §11603(e)(1)(A); *In re Prevot*, 59 F.3d 556, 560 (6th Cir. 1995).

The ICARA specifically requires proof that the children have "been wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. §11603(e)(1)(A). The Hague Convention, in turn, states:

> The removal or the retention of a child is to be considered wrongful where –
>
> a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or

> retention. The rights of custody mentioned in sub-paragraph *a* above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, art. 3.

While declaring that it was not making a Hague Determination, the Nevada district court expressed a tentative opinion that Scotlund had not wrongfully removed the children from Norway, but that Cisilie had wrongfully retained the children in Norway contrary to their agreement. (A26-27; C2); *Vaile v. Eighth Judicial District Court*, 44 P.3d 506, 518-19 (Nev. 2002). The state supreme court disagreed, for the sole stated reason that Scotlund allegedly misrepresented to the district court that he and the children had lived in Nevada. (A27). The supreme court speculated that the order granting custody to Scotlund "might not have been granted" by the district court had it known the true facts of the children's residence. (A27). It did so despite the district court's express findings that the children were in Texas and had never lived in Nevada, and that Scotlund had never intended to defraud the court. (C2-3, 5).

Having decided that Norway was the children's habitual residence, it was incumbent upon the court to determine whether Scotlund's removal of the children from Norway was wrongful under the controlling Norwegian law. The treaty provides that this may be determined by operation of the controlling law, or by honoring a Norwegian court decision, or by determining whether the parties' written agreement would be valid under the controlling Norwegian law. Hague Convention, art. 3 (quoted at p. 5, *supra*.); *see also* 51 Fed. Reg. 10493 (quoted at E4, *infra*.).

The Supreme Court of Nevada did none of these things. Instead, it decided the issue of wrongful removal solely on the basis of the invalidity of the Nevada custody order under Nevada law:

> Accordingly, when Scotlund traveled to Norway to take custody of the children, he did so under an invalid order. Further, Cisilie was properly exercising custody rights over the children when Scotlund arrived in Norway. Because Scotlund removed the children from their habitual residence while Cisilie was validly exercising custody rights over the children, and because he removed the children under the false pretense of a valid custody order, Scotlund wrongfully removed the children from Norway.

(A27); *Vaile v. Eighth Judicial District Court*, 44 P.3d 506, 519 (Nev. 2002).

The court *assumed* that "Cisilie was properly exercising custody rights over the children," but no attempt was made to determine whether this was true under the controlling Norwegian law. (A6). Nor did the Nevada court attempt to determine whether Norwegian law would uphold the validity of the parties' written custody agreement. In fact, when the Nevada Supreme Court was advised that the Norwegian trial court had dismissed the custody proceedings there for want of jurisdiction, it considered this fact immaterial because the Norwegian court had presumably relied on a void Nevada order. (A28); *Vaile*, 44 P.3d at 519 n.48. In fact, the Norwegian trial court had ruled that the children were not domiciled in Norway, but were there only temporarily pursuant to the parties' agreement, which it expressly held was valid. (Supp. App. Ex. F). The Nevada Supreme Court failed to

address the issue of whether the Norwegian court could have relied on the agreement alone, in the absence of the Nevada district court order. In the unlikely event that Nevada has jurisdiction, a determination of this issue is required on remand.

III. The Supreme Court of Nevada Denied Scotlund Due Process by Making the Hague Determination in the First Instance

A. The ICARA Clearly Incorporates Due Process Protections

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty or property without due process of law." U.S. CONST., AM. V. Allegations of procedural due process violations require a two step inquiry: (1) whether a litigant has been deprived of an existing liberty interest; and (2) whether the procedures attendant upon the deprivation of the liberty interest were constitutionally sufficient. *Kentucky Dep't. of Corrections v. Thompson,* 490 U.S. 454, 460 (1989).

There is a consensus that parents have a fundamental liberty interest in the custody of their children. *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997); *Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994); *Robison v. Via*, 821 F.2d 913, 921 (2nd Cir. 1987); *Hooks v. Hooks*, 771 F.2d 935, 941 (6th Cir. 1985); *Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983); *Egervary v. Rooney*, 80 F. Supp. 2d 491, 498-99 (E.D. Pa. 2000).

The next issue is whether the procedures by which Scotlund was deprived of his liberty interest in the custody of his children were constitutionally sufficient. The opportunity to be heard "must be granted at a meaningful time

and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The ICARA provides that notice "shall be given in accordance with the applicable law governing notice in interstate child custody proceedings." 42 U.S.C. §11603(c). Courts interpreting this provision have found the "applicable law" to be the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A ("PKPA"), and the Uniform Child Custody Jurisdiction Act, U.C.C.J.A. § 205 ("UCCJA"). Both the PKPA and the UCCJA provide for "reasonable notice and opportunity to be heard." 28 U.S.C. § 1738A(e) (1980); U.C.C.J.A. § 205. This generally means "a plenary hearing at which both sides are heard." *Velez v. Mitsak*, No. 08-01-00246-CV, 2002 Tex. App. LEXIS 6251 (Tex. App. – El Paso August 29, 2002, n.p.h.); *Egervary*, 80 F. Supp. 2d at 499; *Klam v. Klam*, 797 F. Supp. 202, 205 (E.D. N.Y. 1992).

Cisilie's petition for writ of mandamus never asked the Supreme Court of Nevada to make a determination under the Hague Convention; she asked only for a remand to have the district court make the determination. (Petition, pp. 10, 18). The Nevada district court limited the evidentiary hearing it conducted to the issue of the parties' residence, so that it could determine its own jurisdiction. Concluding that it had jurisdiction over the parents, and emergency jurisdiction over the children, the district court expressed the opinion that it did not need to make a determination under the Hague Convention. It certainly never considered hearing evidence of Norwegian law. To the extent that it considered any evidence, the district court was persuaded by the fact that the parties had agreed for the children to reside within twenty miles of Scotlund, and that their continued residence in Norway was a wrongful violation of the parties' agreement. (C2).

The Supreme Court of Nevada was never asked to sit as a trier of fact and decide a fact question upon which the trial court had never ruled. Because the Nevada trial court did not intend to make a Hague determination, Scotlund was never notified that he needed to put on evidence relevant to that determination. There was clearly no opportunity to introduce evidence on this issue while the case was before the state supreme court. The denial of reasonable notice that the issue would be decided, and the denial of an opportunity to introduce evidence that the Norwegian court would enforce the parties' agreement, constitutes a denial of Scotlund's constitutional right to due process. An order or judgment entered in violation of due process is void. *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 86 (1988).

B. The Lower Courts are Divided on the Extent of the Hearing Required

As previously noted, several courts have held that Hague Convention determinations under the ICARA require "a plenary hearing at which both sides are heard." *Velez*, *supra*; *Egervary*, *supra*; *Klam*, *supra*.

However, at least one circuit has held that courts are "given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing." *March v. Levine*, 249 F.3d 462, 474 (6th Cir. 2001). The Sixth Circuit reasoned that the "treaty requires not only expeditious action by courts . . . but use of 'the most expeditious procedures available.'" *Id.* The court further observed that both the treaty and the ICARA provide a generous authentication rule. *Id.* at 475, *citing* 42 U.S.C. §11605 (1988). It noted that the authentication

rule served to expedite rulings, and that expeditious rulings are critical to ensure fulfillment of the purpose of the treaty – the **prompt** return of wrongfully removed or retained children – is fulfilled. *Id.*, *citing* Hague Convention, art. 1.

Although the *Levine* court merely upheld a summary judgment under the familiar summary judgment standard, its opinion that an evidentiary hearing is not required is both unjustified and inconsistent with the constitutional protections acknowledged by other courts. A policy of promptness and simplified authentication procedures does not support a conclusion that an evidentiary hearing is unnecessary. If anything, simplified authentication procedures imply that an evidentiary hearing is necessary; otherwise there would be no need to authenticate evidence.

The simplified authentication provisions contained in the treaty, which relate to the procedure for determining the controlling law of a foreign jurisdiction, underscore the requirement that the court hearing the Hague Convention petition determine the law of the jurisdiction where the children habitually reside. The lack of an opportunity to prove the controlling Norwegian law not only denied Scotlund due process, but prevented the Nevada court from making this necessary determination

WHEREFORE, PREMISES CONSIDERED, petitioner prays that this Court grant this petition, and that upon final hearing it reverse the judgment of the Supreme Court of Nevada and either render judgment that the orders are void for lack of jurisdiction, or remand the case for an evidentiary hearing under the Hague Convention,

and that the petitioner have such other and further relief to which he may show himself justly entitled.

CONCLUSION

International child abductions are estimated in the hundreds of thousands annually. Jennifer Rauch, Comment: *Child Custody Rights: Should Airlines Be Allowed To Interfere?* 66 J. Air L. & Com. 403, 404 n.2 (2000). The ICARA's grant of concurrent jurisdiction to state and federal courts to enforce the Hague Convention means that there can be no uniform precedent except from this Court. Granting this petition will provide consistency and clarity to this important issue affecting international relations.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEVADA

CISILIE A. VAILE,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, FAMILY COURT DIVISION,
Respondents,
and
R. SCOTLUND VAILE,
Real Party in Interest.

No. 36969

(Filed Apr. 11, 2002)

Original petition for a writ of mandamus or prohibition challenging portions of a divorce decree relating to child custody and visitation and seeking to compel the district court to make a determination regarding the "habitual residence" of two minor children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

Petition granted.

Marshal S. Willick, Las Vegas,
for Petitioner.

Rawlings Olson Cannon Gormley & Desruisseaux and Peter M. Angulo, Las Vegas,
for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

By the Court, AGOSTI, J.:

In this original petition for extraordinary relief we are asked to decide two questions: (1) whether the district court had jurisdiction over one of the parties and over the subject matter when it entered a decree of divorce; and (2) whether the district court correctly concluded that it need not make determinations pursuant to the Hague Convention on the Civil Aspects of International Child Abduction[1] regarding the children's habitual residence and whether the children were wrongfully removed from their habitual residence.

I.

In 1989, Petitioner, Cisilie Vaile, a citizen of Norway, met the Real Party in Interest, Scotlund Vaile, a United States citizen, in Norway. Both were twenty years old. The couple became engaged in early 1990, two weeks after Scotlund, who is fluent in the Norwegian language, had completed his duties as a missionary in Norway. Shortly after becoming engaged, Scotlund returned to live with his father and stepmother in the state of Ohio where he had earlier lived before his assignment to Norway. Cisilie followed within a short period of time. The couple married in Utah in 1990 and then returned to Ohio while Scotlund attended Ohio State University. Scotlund completed his graduate program in 1996; the family then moved to Virginia for Scotlund's employment as an engineer. The

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[1] The Hague Convention on the Civil Aspects of International Child Abduction will be referred to throughout this opinion as "the Hague Convention" or simply as "the Convention."

couple's children, Kaia and Kamilla, were born in the United States in 1991 and 1995, respectively. Because of their parents' nationalities, the children enjoy dual Norwegian and United States citizenship. In August 1997, the family relocated to London, England, where Scotlund's engineering firm had transferred him.

By the autumn of 1997, Scotlund and Cisilie were experiencing grave difficulties in their marriage. In the spring of 1998, the couple agreed to divorce. Fearing Scotlund would take the children to the United States, Cisilie turned to the British courts. She ultimately obtained an agreement from Scotlund upon which the British court based an order dated June 8, 1998. The order prohibited Scotlund from removing the children from the United Kingdom and also prohibited him from removing the children from Cisilie's care until July 8, 1998, when the matter could be heard. On July 7, 1998, Scotlund presented Cisilie with a twenty-three-page written agreement. Cisilie signed the agreement, which purported to settle the couple's property and financial affairs, and which also purported to settle matters of child custody, support and visitation. The agreement contained a provision that the parties would obtain a divorce in Nevada, where Scotlund's mother and stepfather had relocated from Maine in the spring of 1998.

After a hearing in the British court on July 8, 1998, at which both Scotlund and Cisilie appeared, the court entered a written order on July 9 in which Cisilie was granted physical custody of both children and received permission to remove the children permanently from Britain. Scotlund was permitted to have his passport returned to him. The order noted that Scotlund had departed the United Kingdom to go the United States on

the morning of July 9, 1998. Cisilie and the children traveled to Norway on July 13, 1998, and remained there for nearly two years, until May 2000. On July 14, 1998, Scotlund signed a verified complaint for divorce, which was filed in the Eighth Judicial District Court in Clark County, Nevada, on August 7, 1998. Cisilie's answer, in proper person, was filed the same day. Scotlund departed Las Vegas on July 22, 1998, and after vacationing briefly in California, returned during the first week of August 1998 to his work in London.

Scotlund's complaint alleged that he, the plaintiff, was a resident of Nevada and that he had been physically present in Nevada for more than six weeks prior to the filing of the complaint and that he had the intention of making Nevada his home for an indefinite period of time. Of course, this was not true.

The district court in Clark County, without a hearing, entered a decree of divorce on August 10, 1998. The decree incorporated the terms of the parties' twenty-three-page agreement. Among other things, the agreement provided for joint legal custody, with Cisilie to have physical custody until each child is ten years old, after which each child would live for a year with Scotlund and then for a year with Cisilie until each child turned twelve, at which time the child would choose which parent would be the "residential parent." The agreement also obligated Cisilie to move after July 1, 1999, to the United States during the times when she was to be the "Residential Parent," and maintain a residence in proximity to Scotlund's residence.

In November 1999, Scotlund informed Cisilie that he intended to relocate from London, England, to Las Vegas. Scotlund demanded, pursuant to the agreement, that

Cisilie relocate with the children to Las Vegas as well. Cisilie then commenced legal proceedings in Norway to allow her to remain with the children in Norway. Scotlund participated in the Norwegian proceedings.

In February 2000, Scotlund filed a motion in the district court in Clark County, seeking physical custody of the children, a finding that Cisilie was in contempt of the court and an order for the immediate production of the children.

Cisilie did not respond to Scotlund's Nevada motion. Instead she sought, from the Norwegian court, an order for the award of physical custody of the children to her. The Norwegian court appears to have been fully apprised of all the legal actions taken by each party up to that point. The Nevada district court does not appear to have been so informed.

The Norwegian court ordered Scotlund to respond to Cisilie's complaint. Scotlund instead requested an extension of time to respond. Scotlund meanwhile pursued his Nevada motion. On March 29, 2000, the district court in Nevada entered an order granting Scotlund's motion, no opposition having been filed. The order granted Scotlund custody of the children and held Cisilie in contempt.

In May 2000, Scotlund and his girlfriend met Cisilie and her fiance and the children at a hotel in Oslo, Norway. After dining, the four adults and the children went to Scotlund's hotel suite because Scotlund said he wanted to give Kaia a birthday gift. Once inside the suite, Scotlund and his girlfriend took the children into an adjoining room to give them a "surprise." Cisilie and her fiance waited out of view of the children. After a period of time, Cisilie entered the adjoining room and discovered that her children were

gone. The room was empty. At the front desk, Cisilie was given an envelope left by Scotlund, which contained the Nevada court's order. Cisilie contacted the Norwegian police, who treated the incident as a kidnapping. She then filed a petition with the Norwegian court, seeking to enjoin Scotlund from leaving Norway with the children. Scotlund filed a response in opposition to her petition, and the Norwegian court swiftly issued an injunction forbidding Scotlund from taking the children out of Norway. Scotlund had already left Norway, however, and had earlier removed the children from Norway and sent them to his new residence in Texas.[2]

On September 21, 2000, Cisilie filed in the Clark County district court a motion for the Immediate Return of Internationally Abducted Children and Motion to Set Aside Fraudulently Obtained Divorce. In the alternative, Cisilie moved to set aside the order granting Scotlund custody and holding her in contempt and also sought rehearing.

On October 10, 2000, and on October 17, 2000, the district court held an evidentiary hearing. On October 25, 2000, the court entered its order denying Cisilie's motions. Among other things, the district court found that Scotlund had satisfied Nevada's residency requirement, even though Scotlund had never lived in Nevada, and had not even been physically present in Nevada for the requisite

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[2] The Norwegian court did not decide the issue of custody in its order enjoining Scotlund from removing the children from Norway. Rather, the court acknowledged the Nevada court's order and determined that a full hearing was necessary to address the custody issue.

six-week period. The district court therefore refused to set aside the divorce decree for lack of jurisdiction.

II.

The first question before us is whether the district court had jurisdiction to enter its decree of divorce in 1998. We conclude that the district court did not have personal jurisdiction over either party, nor did it have subject matter jurisdiction over the marital status of the parties when it entered the decree.

NRS 125.020(2) states, in pertinent part, "no court has jurisdiction to grant a divorce unless either the plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action." In addition, NRS 54.010 states that when the court's jurisdiction depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence. NRS 10.155 states that the legal residence of a person with reference to his right to maintain a lawsuit is that place where he has been physically present within the state during all of the period for which residence is claimed by him. The statute specifically states that "[s]hould any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence is not considered in determining the fact of residence." The statute requires actual, physical presence in Nevada during "all of the period" for which residency is claimed. The only exception is for absence with a good faith intention of returning without delay. We note that one cannot return to a place of residence if one never lived there.

It is a well-settled principle of law in Nevada that residency under NRS 10.155 encompasses not simply an intent to reside in Nevada for an indefinite period of time, but actual, physical presence in this state for six weeks prior to the filing of the complaint for divorce. In *Fleming v. Fleming,*[3] this court had the opportunity to interpret a statute identical in all material aspects to NRS 10.155; we stated:

> [I]t was the intention of the legislature to prescribe that actual, physical presence should be imminently essential to constitute a residence for the purpose of making that residence legal, where the party had any right dependent on residence. . . .
>
> Giving to the word "resided," as used in the statute, its plain, ordinary significance, it must necessarily be construed to require an actual living in the county for six months preceding the filing of the suit. The word "resided" in its general acceptation carries with it the idea of permanency as well as continuity. It does not mean living in one place and claiming a home in another; it does not mean a constructive or imaginary residence in Washoe County, while actually living or abiding or being in some other county.[4]

In *Aldabe v. Aldabe,*[5] this court cited *Fleming* and a host of other Nevada cases for the proposition that "[r]esidence is synonymous with domicile and it is consonant

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[3] 36 Nev. 135, 134 P. 445 (1913).

[4] *Id.* at 138-40, 134 P. at 447 (citation omitted).

[5] 84 Nev. 392, 396, 441 P.2d 691, 694 (1968).

with the many decisions of our court that the *fact* of presence together with *intention* comprise bona fide residence for divorce jurisdiction."

Applying the principle of actual presence to Scotlund, it is clear that he had not established a residence in Nevada at the time the complaint was filed sufficient to confer upon the court jurisdiction to grant a divorce. Scotlund signed the verified complaint for divorce only five days after he had arrived in Nevada. Scotlund never resided in Nevada at any other, prior point in time. Scotlund's statement in his verified complaint that he was physically present in Nevada for more than six weeks prior to the commencement of the action is false.

Scotlund also filed the affidavit of a witness to corroborate his residency as required by NRS 54.010. The affiant swore as follows: "for more than six weeks I have known Plaintiff and have seen Plaintiff physically present in Clark County, Nevada on an average of 3-4 times weekly, *unless stationed out of the state with his employer.*" (Emphasis added.) Essentially, the resident witness swore under penalty of perjury that she had known Scotlund for more than six weeks but not that she had seen him in Nevada for more than six weeks. This affidavit does not sufficiently corroborate Scotlund's claim of residency. Also, though not raised in this court by either party, we note that the district court's reliance upon the affidavit was improper for an additional reason.

Scotlund filed a complaint for divorce and secured and filed Cisilie's proper person answer. The district court may

grant a divorce upon affidavit and without a hearing when the defendant has defaulted[6] or when the parties have filed a joint petition for divorce that complies with the summary proceedings for divorce set forth at NRS 125.181 to NRS 125.184. In no other circumstances do the domestic relations statutes permit the court to enter a decree of divorce without a hearing.[7] The district court was required to hear the live testimony of both Scotlund and his resident witness before entering its decree of divorce. We raise this point because it appears the district court was misled by the language of the complaint and the affidavit. A hearing might have uncovered the truth and the jurisdictional defect in this case.

Residency is a question of fact to be determined by the district court.[8] Courts in this state are obligated to determine that the residency requirement has actually been met and that residency is not being established by fraudulent means.[9]

In this case, the district court declined to set aside the decree of divorce based upon its determinations that Scotlund was in fact a resident, and that the court therefore had

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[6] NRS 125.123.

[7] WDCR 41 permits the submission of an uncontested divorce without a hearing if the parties stipulate to waive the hearing and if the district court approves the waiver. We are unaware of a similar rule in the Eighth Judicial District Court.

[8] *See Woodruff v. Woodruff*, 94 Nev. 1, 3, 573 P.2d 206, 207 (1978).

[9] *McKim v. District Court*, 33 Nev. 44, 52, 110 P. 4, 5 (1910) ("It is the duty of courts in divorce proceedings to see that the proof of residence is clear and convincing, and that a fraud is not being perpetrated upon the court.").

personal as well as subject matter jurisdiction. Since we conclude that the court did not have jurisdiction because Scotlund was not a resident, the question becomes whether the decree is void or merely voidable.

To answer this question, we turn to *Moore v. Moore*.[10] In that case, the appellant argued that the divorce decree was void because the plaintiff in the divorce proceeding had not satisfied Nevada's residency requirement.[11] The court determined, however, that because evidence was presented to the district court in the form of testimony from the plaintiff showing that he did, in fact, satisfy Nevada's residency requirement, the divorce decree in that case was not void, but merely voidable.[12] Quoting an 1875 United States Supreme Court decision, the court stated:

> "[T]hat if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is *void;* but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is *void;* but in the other the court only errs in judgment upon a question properly before

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[10] 75 Nev. 189, 336 P.2d 1073 (1959).

[11] *See id.* at 191-92, 336 P.2d at 1074.

[12] *See id.* at 193, 336 P.2d at 1075.

> the court for adjudication, and of course the order or decree of the court is only voidable."[13]

Accordingly, we concluded in *Moore* that although inconsistent evidence had been presented to the district court regarding the plaintiff's residency, the divorce decree was not void, but, instead, merely voidable.[14]

Likewise, we refer to our decision in *Smith v. Smith*.[15] In that case, although it initially appeared to the district court that all the requirements for service of process were met, it was later determined that the defendant had not been properly served due to a procedural irregularity.[16] We determined that this procedural irregularity did not render the judgment void, but that the decree was merely voidable.[17]

In the instant case, the evidence presented to the district court consisted of Scotlund's verified complaint and the affidavit of his resident witness. These documents provided the district court, at the time it entered the decree, with evidence legally tending to show a case of jurisdiction. On their face, these documents supported a finding that the district court had jurisdiction over the marital res. We so conclude, despite the inadequacy of the resident witness's affidavit. We note the affidavit was cleverly drafted but also legally tends to show a case of

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[13] *Id.* (emphases added) (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60 (1875)).

[14] *Id.* at 193, 336 P.2d at 1075.

[15] 82 Nev. 384, 419 P.2d 295 (1966).

[16] *See id.* at 385, 419 P.2d at 296.

[17] *See id.* at 386, 419 P.2d at 296.

jurisdiction even though the proof is slight and not conclusive. Based upon the representations contained in the documents, a colorable case for jurisdiction was made; therefore, the decree is voidable rather than void. Finally, the district court's treatment of the case as a summary proceeding for divorce constituted a procedural irregularity that also renders the decree voidable rather than void.

We are compelled to observe that Nevada has a strong interest in protecting its valid divorce decrees. We recognize that Nevada's liberal six-week residency period makes this state an attractive forum in which to obtain a divorce. It is a sad reality of human nature as evidenced by Scotlund's conduct, that despite the liberality of the law, some will seek to speed their cause along in order to achieve a divorce in a time frame that suits their convenience rather than the requirements of the law. The district courts must be willing and prepared to diligently review each divorce action to remain assured that the integrity of any decrees entered is preserved, and should not hesitate to order the taking of testimony where necessary or desirable.[18] We are mindful that divorce decrees granted by our courts affect "collateral rights and interests of third persons."[19] As a matter of policy, district courts should be

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[18] *See* NRS 125.123 (providing that the district court is not required to accept a case for default divorce upon submission; court has the discretion to order a hearing and require the presence of the plaintiff and the resident witness).

[19] *Self v. Self,* 893 S.W.2d 775, 778 (Ark. 1995). In *Self,* the Supreme Court of Arkansas stated:

> We have stated that judgments in matrimonial cases should be more stable than in others, because matrimonial status draws with it so many collateral rights and interests of

(Continued on following page)

very interested in ascertaining whether jurisdiction actually exists before granting the decree so that decrees are valid and enforceable and interested persons can rely on them. Other individual's rights and interests may be significantly affected when a divorce decree is granted but subsequently declared to be void.

Having concluded that the decree is voidable, we determine whether the decree ought to be set aside. The district court "found merit" in Scotlund's argument that Cisilie is judicially estopped from asserting that the court lacked jurisdiction to enter the decree of divorce. The district court was not required to reach the issue of judicial estoppel raised by Scotlund since the court had already determined that it had jurisdiction over both the parties and the subject matter. Nevertheless, the district court considered Cisilie's claim that she had been coerced or was under duress when she signed the answer to the complaint and the agreement. The district court determined as a matter of fact that Cisilie was not coerced or operating under duress. In fact, Cisilie had signed an answer to the complaint which admitted the fact of Scotlund's residence. Based upon these findings, which we will not disturb, the district court determined that Cisilie was estopped from attacking the decree's validity.

> third persons. However, we have also held that when divorces have a "mail-order" appearance, we shall not hesitate to set them aside, even though the divorced party remarries in the meantime, as we cannot permit such frauds to be practiced upon the courts of this state.

Id. (citations omitted).

The rule of judicial estoppel is recognized in Nevada's case law. In *Sterling Builders, Inc. v. Fuhrman*,[20] we noted that according to the rule of judicial estoppel, a party who has stated an oath in a prior proceeding, "as in a pleading," that a given fact is true, may not be allowed to deny the same fact in a subsequent action. In that case, the court indicated that one of the rule's purposes is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter.

As mentioned, Cisilie's answer to Scotlund's complaint admitted that Scotlund was a resident of Nevada. She now asserts a contrary fact in order to support her motion in the trial court to set aside the decree of divorce. We note that she relied upon the validity of the divorce decree when she decided to remarry. Because the district court determined that she was not operating under duress and was not coerced but did voluntarily sign the answer, her representations of fact contained within the answer are the proper subject for the application of the rule of judicial estoppel. Therefore, the voidable decree of divorce will not be set aside.

Two separate dissents have been written in this case. Both question our conclusion that Cisilie is judicially estopped from obtaining an order setting aside the decree of divorce based upon the district court's lack of jurisdiction. In brief response, we reiterate that the district court concluded as matters of fact that she was neither coerced nor under duress when she signed the answer and the

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[20] 80 Nev. 543, 549-50, 396 P.2d 850, 854 (1964).

agreement. The dissent points out that she did not prepare the answer she signed, and the record discloses no evidence that she was aware of Nevada's residency requirement. However, she knew that Scotlund had not resided in Nevada for six weeks when she signed the answer. She took advantage of those aspects of the agreement which allowed her to take custody of the children and she depended upon the decree's validity when she planned to marry again.

We realize that the posture of this case is unusual and unique since we are refusing to void a decree which was entered, as it turns out, by a court which had no jurisdiction over the parties. However, to reiterate, the decree was entered when the court believed it had jurisdiction. Any person who might review the district court filings would have no reason but to trust the validity of the court's decree. Under these circumstances, the law and the policies which support it permit no result other than that the decree is voidable, not void. As mentioned and for the reasons previously stated, we decline to declare the decree void.

Ironically, were we to adopt the reasoning of either dissent, then the fears of Justice Young that Scotlund might profit from a fraud upon the court would become a reality. As we will discuss next, we do declare void that portion of the decree which purports to determine the custody and visitation rights of the parties. However, because the decree is voidable and because we decline to declare it void, we are able to require the district court to make a Hague Convention determination, as we will also discuss in this opinion. Scotlund, as noted, resides now in Texas and he has possession of the children. Were we to set aside the decree in its entirety, we would not be in a

position to order the Hague determination. Cisilie would be put in the position of having to begin anew and commence, if she can, a proceeding against Scotlund in Texas.

The district court, in refusing to set aside the decree of divorce, also properly determined that it had no jurisdiction over the children. The court nevertheless determined that it had "jurisdiction over the parties' conduct toward each other with regard to the agreement under a contract theory." Based upon that analysis, the district court did not set aside the custody provisions of the divorce decree, and it erred in this regard. The children have never lived in Nevada. Neither party has ever lived in Nevada. The children have never had any contact with Nevada, much less substantial contact with the state. Neither do the parents have substantial contact with Nevada. The district court had no subject matter jurisdiction over the issue of child custody.[21]

Parties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist.[22] The provision in the parties' agreement selecting Nevada as their forum for a divorce does not bind the court, nor does it confer jurisdiction upon the court. The court may not assume jurisdiction over matters of child custody and visitation based upon its perception of a "contract theory" or upon its view that because it has asserted personal jurisdiction over the parties, it can order them to do or not do certain things. Because the voidable decree has not

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[21] NRS 125A.050 (setting forth the factors for determining whether a court has jurisdiction to determine child custody).

[22] *Finley v. Finley*, 65 Nev. 113, 120, 189 P.2d 334, 337 (1948).

been set aside, the court had colorable personal jurisdiction over the parties and the subject matter of their marital status. Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.

Unless the court can properly exercise subject matter jurisdiction according to the terms of the Uniform Child Custody Jurisdiction Act (UCCJA), which Nevada has adopted, it is without authority to enter any order adjudicating the rights of the parties with respect to custody and visitation. A provision in a divorce decree adjudicating custody and visitation in the absence of subject matter jurisdiction is void, as we held in *Swan v. Swan.*[23]

In *Swan,* the father moved to Nevada from Utah and, after several months, filed a complaint for divorce in Nevada. After filing his complaint, he returned to Utah, took the children and returned to Nevada with them. The mother filed an answer and contested the Nevada court's subject matter jurisdiction, but made no further filings or appearances in the action. The court granted the father a divorce and, based upon his testimony that the children resided with him, granted him custody. One and a half years later, the mother moved to vacate the custody provisions of the decree on the basis that the Nevada court had no jurisdiction over the subject matter under the UCCJA. Her motion was denied, but the district court's decision was reversed on appeal. We analyzed the facts

[23] 106 Nev. 464, 796 P.2d 221 (1990).

under Nevada's version of the UCCJA and determined first, that Nevada was not the children's home state; second, that the children's residence in Nevada for forty days did not constitute a significant connection with this state; and third, even if dual jurisdiction existed, Utah was the more appropriate forum. Consequently, we concluded that the district court had incorrectly awarded custody as an incident of the default decree without having subject matter jurisdiction, and that the custody portion of the decree was void.[24] In our opinion, we noted that subject matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court of review.[25]

NRS 125A.050, which was adopted as a part of the UCCJA, sets out those circumstances under which a Nevada court has jurisdiction to make a child custody determination by initial or modifying decree. Under NRS 125A.050(1)(a), this state must be the home state of the children or have been the home state within six months before the action commenced. Neither is the case here. Under NRS 125A.050(1)(b), a Nevada court may exercise jurisdiction if it is in the children's best interest to do so because the children and at least one of their parents have a significant connection with Nevada and substantial evidence is available in Nevada concerning the children's present and future care, protection, training and personal relationships. As neither the children nor the parents have ever lived here or have a significant relationship with Nevada, virtually no information is available in this state

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[24] *Id.* at 469, 769 P.2d at 224.

[25] *Id.*

to even arguably create jurisdiction under this provision. NRS 125A.050(1)(c) does not apply because it requires the presence of the children in Nevada. Finally, under NRS 125A.050(1)(d), Nevada may exercise jurisdiction if no other state would have jurisdiction or if another state has declined to exercise jurisdiction on the ground that Nevada is the appropriate forum and it is in the child's best interest that Nevada assume jurisdiction. This section of the statute also provides no basis for the Nevada court's exercise of jurisdiction. At the time the decree was entered, the children's last significant contacts with any state were with Ohio and Virginia. After living in Ohio and then Virginia, the children moved to the United Kingdom and Norway. Under NRS 125A.050, these countries are both considered states.[26] Neither Ohio nor Virginia has declined to exercise jurisdiction. Norway and the United Kingdom have both been involved in custody disputes between the parties.

The district court lacked subject matter jurisdiction over matters of custody and visitation when it entered the decree of divorce in 1998, and therefore the provisions of the decree which purport to fix the obligations of the parties with respect to custody and visitation are void.

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[26] NRS 125A.030 [sic] is captioned "Application of chapter to decrees of other nations." The statute states:

> The general policies of this chapter extend to other nations. The provisions of this chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

III.

Next, we address petitioner's argument that the district court was required to make a determination, under the Hague Convention on the Civil Aspects of International Child Abduction, regarding the children's habitual residence, and whether the children were wrongfully removed from their habitual residence as those terms are construed under the Convention. The district court incorrectly concluded that it need not make such a determination. First, we note that Nevada has jurisdiction to make the determination. The United States Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA").[27] Under both the Convention and ICARA, an aggrieved party may institute judicial proceedings in the country to which the children have been removed.[28] State and federal courts have concurrent jurisdiction over such disputes.[29] Additionally, we conclude, as a matter of law, that the habitual residence of the children was Norway, and that the children were wrongfully removed from that country. Accordingly, the Hague Convention mandates that the children be promptly returned to Norway so that the courts there can determine the issue of custody.

The Hague Convention on the Civil Aspects of International Child Abduction, to which the United States and Norway are signatories,[30] seeks to "secure the prompt

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[27] 42 U.S.C. §§ 11601-11610 (1988).

[28] Hague Convention, arts. 8, 11, 29; 42 U.S.C. § 11601 (1988).

[29] 42 U.S.C. § 11603 (1988).

[30] The United States ratified the Convention in 1988, while Norway ratified the Convention in 1989.

return of children wrongfully removed to or retained in any Contracting State."[31] Furthermore, the primary purpose of the Hague Convention is "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court."[32] The Hague Convention is meant to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence."[33]

To achieve these goals, the Convention requires that, subject to certain exceptions, children who habitually reside in a signatory country and are removed to or retained in another signatory country in breach of the left-behind parent's custody rights shall be promptly returned to the country of their habitual residence.[34] The Convention provides that only after the children are returned to the country of their habitual residence will a custody determination be made.[35] Therefore, a court considering a petition under the Convention has jurisdiction to decide the merits of the wrongful removal claim, but not the underlying custody dispute.[36]

In this case, the district court determined that it was unnecessary to make a Hague Convention determination.

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[31] Hague Convention, art. 1.

[32] *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir.1993) ("*Friedrich I*").

[33] Hague Convention, preamble.

[34] Hague Convention, arts. 12, 13.

[35] *Id.* art. 19.

[36] *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir.1996) ("*Friedrich II*").

The district court said that if it were to make a determination under the Convention, it would find that the children's habitual residence is Nevada, and that Cisilie had wrongfully retained the children in Norway. We disagree with these findings, based upon the uncontroverted fact that neither parent has ever lived in Nevada. We also conclude that the district court should have made a determination under the terms of the Convention.

Habitual residence

First, we examine the question of which country serves as the children's habitual residence. We begin by observing that although a court must identify which country is the children's "habitual residence," this term is nowhere defined in the Convention.[37] Instead, the term is intended by the Convention's drafters to be applied to the facts and circumstances of each case in a non-technical manner.[38]

We are not without guidance, however. Other courts that have addressed this issue have stated that when

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[37] *See Miller v. Miller,* 240 F.3d 392, 400 (4th Cir.2001); *Friedrich I,* 983 F.2d at 1400.

[38] See *Friedrich I,* 983 F.2d at 1401 (quoting *In Re Bates,* No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989) (quoting Dicey & Morris, *The Conflicts of Laws* 166 (11th ed.))), which explained:

> "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."

determining a child's state of habitual residence, courts must look back in time, not forward.[39] In other words, courts must look to the past experiences of the parties, and not to the parties' future intentions.[40] Furthermore, when conducting this inquiry, the focus is on the child, not the parents.[41] Therefore, any subjective intentions that the parents harbor regarding where the child is to live are irrelevant. Additionally, any change in geography that would affect a child's habitual residence must occur before the removal at issue.[42] Although the child's physical whereabouts are central to an inquiry, one parent's "questionable removal" of the child is not determinative when ascertaining habitual residence. Courts also look to where children have a "degree of settled purpose."[43] Under this analysis, the child has a degree of settled purpose in "the place where he or she has been physically present for an amount of time sufficient for acclimatization."[44]

Ordinarily, a determination of habitual residence is a question of fact which we will not disturb. After reviewing the facts and circumstances of this case, however, we conclude, as a matter of law, that only one country could possibly be the habitual residence. The children's state of habitual residence prior to their removal was Norway. The record in this case reveals that in July 1998, when the children were three and seven years of age, they moved

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[39] *Friedrich I,* 983 F.2d at 1401.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Feder v. Evans-Feder,* 63 F.3d 217, 224 (3d Cir.1995).

[44] *Id.*

from London, England, where they were residing at the time, to Norway. They remained in Norway for twenty-two months until they were removed to the United States by Scotlund in May 2000. While in Norway, the children were registered under Norwegian law as residents of that country. And during their stay in Norway, the children attended school and otherwise conducted their lives as normal children. The children, while living in Norway, had a "degree of settled purpose" to remain there.

Although there is some evidence in the record that Cisilie and Scotlund may have intended that the children would move to the United States at some time in the future,[45] the courts are not bound, as we have previously stated, by the intentions of the parents regarding future events.[46] Furthermore, Scotlund's unilateral act of removing the children from Norway cannot change their state of habitual residence. Therefore, the children's state of habitual residence was Norway at the time Scotlund removed them from that country. Their habitual residence could be nowhere else. It could not be Nevada, as neither they nor their parents ever lived here. It could not be Great Britain, as no evidence exists in the record to support a finding that upon the family's departure from Great Britain, either parent ever expected to return.

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[45] The children have dual American and Norwegian citizenship.

[46] Based upon our thorough review of the record, we harbor grave concerns regarding the validity of Scotlund and Cisilie's "agreement." In any event, because we have determined that the portion of the divorce decree that incorporated the custody and visitation provisions of the agreement is void, we are not bound by those terms.

Wrongful removal

Having concluded that the children's habitual residence was Norway, we must next determine whether Scotlund "wrongfully removed" the children from that country. Under the Hague Convention, removal or retention of a child is wrongful if it violates the custody rights of another person which were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention.[47]

In the underlying case, the district court concluded that it need not make a Hague Convention determination because Scotlund had not wrongfully removed the children from Norway. Instead, the district court found that Cisilie had wrongfully retained the children in Norway contrary to their agreement. The district court's determination that Scotlund had not wrongfully removed the children from Norway was improper.

Scotlund arrived in Norway with an order from the district court finding Cisilie in contempt for violating the terms of the Nevada divorce decree. Specifically, the district court had determined that Cisilie was violating the

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[47] Hague Convention, art. 3. This article reads:

> The removal or retention of a child is to be considered wrongful where –
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> *a* it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> *b* at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

parties' agreement, which had been incorporated into the terms of the divorce decree and which required her to return the children to Scotlund. Accordingly, the district court granted Scotlund custody of the children.

The district court, however, relied upon Scotlund's untruthful representation when it issued its order granting him custody of the children. At the hearing held to decide whether Cisilie was in contempt of court for failing to bring the children to the United States as contemplated by the parties' agreement, the district court asked Scotlund how long he and the children had lived in Nevada. Scotlund responded that they had lived in Nevada "all their lives." The district court then issued its order holding Cisilie in contempt. This order further stated that Cisilie was to immediately return the children to Scotlund's custody.

Had the district court been apprised of the true facts, the order compelling Cisilie to return the children to Scotlund's custody might not have been granted. Moreover, the underlying basis for the order, the provision in the divorce decree incorporating the parties' agreement as to custody and visitation, is void and unenforceable.

Accordingly, when Scotlund traveled to Norway to take custody of the children, he did so under an invalid order. Further, Cisilie was properly exercising custody rights over the children when Scotlund arrived in Norway. Because Scotlund removed the children from their habitual residence while Cisilie was validly exercising custody rights over the children, and because he removed the children under the false pretense of a valid custody order, Scotlund wrongfully removed the children from Norway. Under the terms of the Hague Convention, the children

must be returned to Norway so that any decision regarding custody can be made in the courts of that country.[48]

IV.

In this case, the district court lacked subject matter jurisdiction over custody and visitation. Furthermore, the district court manifestly abused its discretion by failing to make a determination under the Hague Convention on the Civil Aspects of International Child Abduction regarding the children's state of habitual residence. As the children's state of habitual residence was, as a matter of law, Norway, and as Scotlund wrongfully removed the children from that country, the district court was required to make these determinations. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus compelling the district court to vacate those portions of its decree relating to custody and visitation and to order the children's return to Norway, where custody determinations can be made.

/s/ Agosti, J.
Agosti

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[48] Hague Convention, art. 12. We also note in passing that after Cisilie filed her petition in this court, Scotlund informed us that the Norwegian court determined that it does not have jurisdiction to determine custody. The Norwegian court's decision placed "decisive emphasis" upon the parties' twenty-three-page agreement and the district court's decree of divorce. The Norwegian court obviously presumed that the decree was valid in all respects. The crucial provisions of the decree upon which the Norwegian court relied are void.

We concur:

/s/ Rose, J.
Rose

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

MAUPIN, C.J., dissenting.

I would grant the petition and declare the voidable divorce decree void in its entirety. In granting the petition, I would further conclude that the district court was not authorized to grant relief under NRS 125A.050, nor was it authorized to make findings under the Hague Convention on the Civil Aspects of International Child Abduction.

It is true that petitioner judicially admitted the facts alleged in the original divorce complaint in support of the real party in interest's residency, and thus the primary fact in support of subject matter jurisdiction over the marriage and the issues related thereto. The majority now concludes that this admission constitutes a judicial estoppel, which relieves the district court, and therefore this court, from the obligation to declare as void, in its entirety, the admittedly voidable divorce decree. I disagree.

Once the facts of voidability became known, it was incumbent on the district court to void the decree for want of subject matter jurisdiction. As the majority points out, actions of the parties cannot confer subject matter jurisdiction on a court when none otherwise exists. Application of the doctrine of judicial estoppel to these facts would do

just that. Since the district court determined that it did have jurisdiction, it is incumbent upon this court to now declare the underlying decree void in its entirety.[1]

The majority's reliance on our published opinion in *Sterling Builders, Inc. v. Fuhrman*[2] is misplaced. This is because our application of judicial estoppel in *Sterling* had nothing to do with subject matter jurisdiction. *Sterling* merely applied the rule of estoppel to prevent a party from denying that a partnership existed in the context of a factual dispute.[3] The *Sterling* decision did not apply the doctrine of judicial estoppel to confer jurisdiction where there was none, and we should not do so now.

The estoppel argument was not sufficient to give any continuing life to the decree. I realize that, under this view, there would be collateral effects on these parties with regard to their post-decree actions and their status as divorced persons. This is particularly unfortunate with regard to petitioner who, at the very least, was a victim of the post-divorce behavior of the real party in interest. This does not, however, alter the fact that the decree was actually voidable in all respects and should be so declared.

No other remedies are available to petitioner under Nevada law. NRS 125A.050, the Nevada version of the UCCJA, cannot provide relief since Nevada is neither the home state of the children of the parties, nor was it their

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[1] *See* NRCP 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[2] 80 Nev. 543, 396 P.2d 850 (1964).

[3] *Id.* at 549-50, 396 P.2d at 854.

home state at any time. In point of fact, these children have never had any significant connection with the state. It therefore appears that the district court was seriously misled in its deliberations below, given the real party in interest's statement that the children had lived in Nevada "all their lives."

The district court also does not have jurisdiction to make findings under the Hague Convention on the Civil Aspects of International Child Abduction. This is because actions under the Convention must be made in a "court which has jurisdiction of such action[s] *and* which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."[4]

/s/ Maupin, C.J.
Maupin

YOUNG, J., with whom SHEARING, J., agrees, dissenting:

I disagree with the majority's conclusion that the decree of divorce is voidable, not void; and I also disagree with the majority that Cisilie is judicially estopped from questioning the decree obtained through Scotlund's fraud.

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[4] 42 U.S.C. § 11603(b) (1995) (emphasis added).

It does appear from the record of this case that these children were wrongfully removed from Norway, that Norway was their habitual residence at the time of their abduction and that, under the Convention, they should be returned to the Norwegian tribunal for the appropriate custody determination. It also appears that the Norwegian court was misled into deferring to the voidable Nevada decree.

1. The decree of divorce is void, not voidable

In the majority opinion, my colleagues hold that the decree fraudulently obtained by Scotlund without establishing residency is voidable, not void. This holding is contrary to long-established law in this state and undermines Nevada's statutory scheme requiring a six-week residency.

For many years, it has been well settled that a divorce decree issued by a district court *without* jurisdiction is void.[1] Here, the majority relies on *Smith v. Smith*[2] where the plaintiff's good faith failure to properly serve the defendant constituted a procedural irregularity rendering the judgment merely voidable, not void.

Smith is factually distinguishable from the instant case because in that case there was no fraud, merely a procedural irregularity. The plaintiff in *Smith* established residency for the requisite period in Nevada; the testimony of the resident witness was not flawed. A default had been taken after thirteen days from service of process instead of the requisite twenty days. In contrast, here, Scotlund did not attempt to comply with Nevada law requiring six-week residency. Scotlund had resided in Nevada only five days when he signed the complaint. Thus, this case does not involve a mere procedural irregularity as in *Smith*. The majority's reliance on *Smith* is misplaced because here the

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[1] *Milton v. Gesler*, 107 Nev. 767, 771, 819 P.2d 245, 248 (1991) (holding that because the district court acted without jurisdiction, the decree of divorce is void); *La Potin v. La Potin*, 75 Nev. 264, 266, 339 P.2d 123, 123-24 (1959) (same); *Perry v. District Court*, 42 Nev. 284, 288, 174 P. 1058, 1059 (1918) (same).

[2] 82 Nev. 384, 419 P.2d 295 (1966).

district court clearly lacked jurisdiction and the decree of divorce was void.[3]

Additionally, the majority relies on *Moore v. Moore*.[4] In *Moore*, the husband obtained a decree of divorce after he had physically resided in Nevada for more than six weeks.[5] Later, the husband and wife sought to void the decree saying that although the husband had been physically present in Nevada and contrary to his testimony in court, he really had not intended to make Nevada his residence.[6] To determine whether the decree of divorce was void or voidable, we reviewed the "manner in which the trial court had exercised its authority to resolve the factual problem confronting it [the issue of residency]."[7] Specifically, we noted that a decree is void when there is "'a total defect of evidence to prove the essential fact, and the court find[s] it without proof.'"[8] Under such circumstances, "'the court acts without authority, and the action of the court is void.'"[9] In *Moore*, the husband's testimony that he had been a bona fide resident in Nevada for more than six weeks was sufficient to make the decree of divorce merely voidable.[10]

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[3] *See Milton*, 107 Nev. at 771, 819 P.2d at 248; *La Potin*, 75 Nev. at 266, 339 P.2d at 123-24; *Perry*, 42 Nev. at 288, 174 P. at 1059.

[4] 75 Nev. 189, 336 P.2d 1073 (1959).

[5] *Id.* at 192, 336 P.2d at 1074.

[6] *Id.* at 190-92, 336 P.2d at 1073-74.

[7] *Id.* at 193, 336 P.2d at 1075.

[8] *Id.* (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60 (1875)).

[9] *Id.* (quoting *Lamp Chimney*, 91 U.S. at 660).

[10] *Id.* at 192-93, 336 P.2d at 1074-75.

In contrast, the facts before this court indicate that there was a total defect of evidence proving that Scotlund was a resident of Nevada. Three facts are significant. First, the majority admits that Scotlund's statement concerning residency in the verified complaint was false. In fact, when the complaint was signed, Scotlund had been in the state for a period of only five days. Second, the affidavit of the resident witness did not corroborate Scotlund's claim of residency by "clear and convincing evidence" as required by law.[11] The affidavit was cleverly worded to indicate that the affiant had known Scotlund for "six weeks" – but *not* during the six weeks he was claiming residency in Nevada. The affiant further stated that she had seen Scotlund physically present in Nevada "on an average of 3-4 times weekly." It was signed when Scotlund had been in Nevada only six days, not for a period of six weeks. Third, the district court entered the decree in chambers without a hearing. At the time the decree was signed, Scotlund was thousands of miles away in England. It is abundantly clear that Scotlund had not established a residence in Nevada at the time the complaint was filed sufficient to confer jurisdiction upon the district court to grant a divorce.

Unlike *Moore,* there was a total defect in the evidence presented to the district court. Hence, based on the lack of residency, the decree of divorce is void, not merely voidable.

Adopting the majority's view would undermine Nevada's statutory scheme requiring a six-week residency. A

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[11] *McKim v. District Court,* 33 Nev. 44, 52, 110 P. 4, 5 (1910).

non-resident plaintiff seeking an expedient divorce could travel to Nevada, file a complaint the same day, and obtain a decree of divorce immediately. The problem with holding that such a decree is voidable, as we are urged to do in the majority opinion, is that individuals could commit fraud upon our courts and reap the dubious benefits of a voidable divorce decree, which is what Scotlund is doing here.

2. Judicial estoppel

Scotlund attempts to breathe life into a void decree by alleging that Cisilie is judicially estopped to question the validity of the void decree. If we hold the decree of divorce to be void, we need not reach the question of whether Cisilie is judicially estopped. However, since the majority reached this question, I feel obliged to convey my concerns about the application of judicial estoppel under the circumstances before this court.

The United States Supreme Court has stated that judicial estoppel is designed to "'protect the integrity of the judicial process'"[12] in order to "'prohibit[ ] parties from deliberately changing positions according to the exigencies of the moment.'"[13] It follows that the doctrine of judicial estoppel is an equitable doctrine applied by a court at its discretion.[14]

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[12] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir.1982)).

[13] *Id.* at 750 (quoting *U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993)).

[14] *Id.*

In this case, I submit the district court erred by finding that Cisilie was not coerced or operating under duress when she signed the answer (prepared by Scotlund's Nevada divorce attorney) admitting to Scotlund's claim of residency.[15] The record shows that Scotlund had threatened Cisilie that he would take the couple's children away from her if she did not cooperate with the divorce.[16] It was a threat that was later carried out when Scotlund kidnapped the children in Norway by trickery and deceit and flew to the United States. The district court abused its discretion by invoking the doctrine of judicial estoppel against Cisilie.

Moreover, a court has discretion not to apply judicial estoppel when "'a party's prior position was based on inadvertence or mistake.'"[17] In this case, Cisilie is not judicially estopped because there is no evidence to suggest that she was aware of Nevada's residency requirement. In fact, she had never resided in Nevada. The answer that she signed was prepared by her husband's attorney in Nevada and sent by airmail to her in Norway for immediate signature. She had planned on remarriage; but when an attorney in Norway advised her that there might be

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[15] When Cisilie received the answer, she was unknowingly recruited by Scotlund to participate in the perpetration of fraud upon the district court. I see no evidence to the contrary.

[16] Cisilie could reasonably believe that Scotlund would carry out his threats and that she would never see her children again based on Scotlund's family history. Cisilie was aware that Scotlund's mother had kidnapped him and his siblings to another state, changed their last name, and the father kidnapped them back.

[17] *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir.1995)).

some doubt as to the validity of the Nevada decree, Cisilie cancelled the marriage ceremony. She has spent thousands of dollars in fees and travel expenses in an effort to set aside the admittedly fraudulent decree and will presumably have to spend thousands of additional dollars to regain custody of her children illegally taken from her in Norway by Scotlund. Thus, the district court incorrectly applied the doctrine of judicial estoppel because Cisilie's admission to Scotlund's claim of residency was not knowingly made and certainly not a representation that Scotlund could rely on to prove his residency under Nevada law or prevent her from questioning the residency requirement.

Finally, we have stated that the "'purpose of the doctrine of judicial estoppel is to suppress fraud . . . and to eliminate the prejudice that would result to the administration of justice if a litigant were to swear one way one time and a different way another time.'"[18] In this case, invoking judicial estoppel against Cisilie protects Scotlund from the consequences of his fraud upon the district court and inhibits the administration of justice. Scotlund was the sole architect of the scheme to perpetrate fraud on the district court. He should not be allowed to harvest the benefits of such fraud. Our court should not close the doors of justice to the innocent and reward the wrongdoer in the name of judicial estoppel.

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[18] *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 550, 396 P.2d 850, 854 (1964) (quoting 31 C.J.S. *Estoppel* § 121, at 649, 650).

3. Digression (the state of our legal system)

I am disturbed about the conduct of Scotlund's divorce attorney in this case. The attorney prepared a complaint that falsely alleged Scotlund's residency in Nevada. The divorce attorney knew or should have known that Scotlund had not been a resident of Nevada for six weeks when he signed the complaint.[19] Further, the affidavit signed by the resident witness was cleverly drafted by the divorce attorney in a misleading manner in an effort to corroborate residency.

CONCLUSION

I strongly disagree with the conclusion of the majority that the decree of divorce was merely voidable, not void. The decree of divorce is void because the district court lacked jurisdiction to grant a divorce. To hold the decree voidable will lead to absurd results and undermines Nevada's statutory scheme requiring residency of at least six weeks. Moreover, in my opinion, the court need not reach the question of judicial estoppel because the decree is void. Nonetheless, I strongly disagree with the conclusion that Cisilie is somehow judicially estopped. She was the victim, not the wrongdoer. Finally, the district court lacked subject matter jurisdiction to make findings under the Hague Convention. Scotlund lied to the district court, during the custody hearing, when he testified that the children had lived in Nevada "all their lives." The fact is

[19] The record indicates that the divorce attorney and Scotlund were communicating about the divorce case when Scotlund was living in England, just days before he flew to Las Vegas.

that the children had never resided in Nevada and apparently after being kidnapped in Norway were flown to Texas where presumably they now live.[20]

/s/ Young, J.
Young

I concur:

/s/ Shearing, J.
Shearing

---

[20] I would refer this matter to the State Bar of Nevada for investigation of the conduct of Scotlund's divorce lawyer. *See* NCJC Canon 3D(2) (imposing upon a judge an affirmative obligation to take appropriate action upon receiving information indicating substantial likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct). Furthermore, I am disturbed with Scotlund's behavior. Accordingly, I would refer this matter to the Clark County District Attorney's Office for investigation. The clerk of this court shall provide a copy of this opinion and dissent to the State Bar of Nevada and to the Clark County District Attorney's Office.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEVADA

CISILIE A. VAILE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, FAMILY COURT DIVISION, Respondents, and R. SCOTLUND VAILE, Real Party in Interest.	No. 36969

WRIT OF MANDAMUS

TO: The Honorable Cynthia Dianne Steel, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of mandamus issue,

NOW, THEREFORE, you are compelled to vacate those portions of the decree relating to custody and visitation and to order the children's return to Norway, where custody determinations can be made, in the case entitled Vaile vs. Vaile, Case No. D230385.

WITNESS The Honorables Deborah A. Agosti, Robert E. Rose, Myron E. Leavitt, and Nancy A. Becker,

Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 11th day of April, 2002.

[SEAL]

/s/ Bruce A. Horstmanshoff
Chief Assistant Clerk

APPENDIX C

ORDR [sic]
JOSEPH F. DEMPSEY, Esq.
Nevada Bar No. 004585
DEMPSEY, ROBERTS & SMITH, LTD.
Attorneys at Law
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(702) 388-1216
Attorney for Plaintiff
R. SCOTLUND VAILE

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

R. SCOTLUND VAILE, Plaintiff, vs. CISILIE A. VAILE, Defendant.	CASE NO: D 230385 DEPT. NO: G DATE OF HEARING: 10-17-2000 TIME OF HEARING: 3:30 p.m. (Filed Oct. 25, 2000)

ORDER

The DEFENDANT'S *MOTION FOR IMMEDIATE RETURN OF INTERNATIONALLY ABDUCTED CHILDREN AND MOTION TO SET ASIDE FRAUDULENTLY OBTAINED DIVORCE, OR IN THE ALTERNATIVE, SET ASIDE ORDERS ENTERED ON APRIL 12, 2000, AND REHEAR THE MATTER, AND FOR ATTORNEY'S FEES AND COSTS* having come on for hearing on the

above indicated date, the Plaintiff present and represented by his attorney. JOSEPH F. DEMPSEY, ESQ., of the law firm of DEMPSEY, ROBERTS & SMITH, LTD., and the Defendant present and represented by her attorneys, LAW OFFICE OF MARSHAL S. WILLICK, P.C., appearing before the **HONORABLE CYNTHIA DIANNE STEEL** and the Court having reviewed al [sic] the papers, pleadings and records on file herein, together with the oral argument of counsel and good cause appearing; **the Court finds**:

1. This Court finds no support restricting it from looking at other issues first before making a Hague Convention decision. This Court makes no Hague Convention determination, but if it did make such a determination, the Court would find that the habitual residence and contracting state for the children would be the State of Nevada pursuant to the Decree of Divorce and that the Plaintiff, Scotlund Vaile, did not wrongfully take the children, but instead, Defendant, Cisilie Vaile, was wrongfully retaining the children in Norway beyond those agreements which were in place between the parties at that time. Those agreements had not been objected to by anyone at that point in time when Mr. Vaile resecured his children.

2. There is no case that says "If you are living out of country and you want to move from one place to another, that moving your address was not enough." That based upon testimony of the witnesses, that these parties both wanted a divorce and didn't want to wait another year to achieve it. That Mr. Vaile took sufficient steps to change his residence from the State of Virginia to the State of Nevada prior to May 12, 1998. If a billing statement from a credit card company was mailed May 12, 1998, it is absolutely imperative that Mr. Vaile write them a letter long before that time to make certain that the address

change is made. Just because a billing statement does not state May 12, 1998, it does not mean that there was no prior conduct by Mr. Vaile to change his address from the State of Virginia to the State of Nevada. Therefore, the Court believes it was Mr. Vaile's intention to remove his residence from the State of Virginia, and move it to the State of Nevada. Since Mr. Vaile's body was neither in Virginia nor Nevada, and because he was restrained by the British authorities in London, he could not be physically present in Nevada. But for those things, Mr. Vaile would have been physically present in Nevada sooner than he was actually present in Nevada. Therefore, the Court believes that it was Mr. Vaile's intent to be physically present in Nevada and the Court relies on Mr. Vaile's changing of address of his legal residence from one place to another.

3. That the Court does not find that Mr. Vaile had intentionally tried to defraud the Court, as the Court does not find Ms. Vaile intentionally trying to defraud the Court. The Court believes that both parties just wanted to be anywhere, without the other. Therefore, the Court finds that there was both personal jurisdiction and subject matter jurisdiction in order to achieve the Decree of Divorce and the separating of whatever properties were separated.

4. That the Court also finds merit in the argument of Judicial Estoppel. The Court does not believe that Ms. Vaile signed the Decree of Divorce under duress. The timing is not appropriate for Ms. Vaile to claim duress. The Court does not believe Ms. Vaile felt that Mr. Vaile would take the children from her under some American Law. Ms. Vaile already had forces under British law preventing Mr. Vaile from taking the children and Ms.

Vaile had the Decree of Divorce domesticated in Norway as soon as she received a copy of it. The Court believes that Ms. Vaile was pretty comfortable with her legal surroundings in Europe. Therefore, the Court does not believe that Ms. Vaile had any feelings of duress at the time she signed the admissions in the Answer. Further, if Ms. Vaile felt that she had been under duress, or that there was a lack of jurisdiction, at that time, her redress would have been to immediately file something in Norway, England or elsewhere to try to correct it. Ms. Vaile did nothing in this regard. The Court simply does not believe Ms. Vaile was coerced or under any duress whatsoever.

5. That when the Court considers the full faith and credit with regard to the residency laws, the Court believes that the Court does not want citizens of the United States forum shopping. This Court does not want somebody who actually lives in Virginia and who could run to the courthouse there, flying to Las Vegas and in a half an hour obtaining a divorce, and flying back to Virginia saying "I beat the rap!" That is the full faith and credit this Court is trying to achieve by adhering to the residency statutes. However, in this case, the Court finds that these parties had left Virginia and neither of them had any intention of ever returning to Virginia. Therefore, the Court believes it was the intent of the parties to relocate to Nevada, be it for tax purposes, or any other purpose. Because Mr. Vaile's mother lived here and he needed some time to "catch his breath," whatever the reason is, they came here and Mr. Vaile had no idea when he was going to leave when he signed the Decree.

6. That the Court finds that Ms. Vaile took advantage of the Decree of Divorce, immediately moved to Norway with the children for a year, then decided after a year that she

didn't want to live up to the agreement. The appropriate thing for the parties would be to file a motion.

7. The Court further finds that the Court never had jurisdiction over the Children, because the children were never present in this state. The Court had jurisdiction over the parties' conduct toward each other with regard to the agreement under a contract theory. He (Mr. Vaile) promised to do certain things and she (Ms. Vaile) promised to do certain things and they did not do those things. When the parties came back to Court the Court, after Ms. Vaile was properly served and the Court gave her extra time to respond, the Court issued the Order that Mr. Vaile could retrieve the children. That Order is a "Pick Up" Order, which are normally followed by another hearing. That didn't happen. The Court had jurisdiction over the conduct of the parties, but it did not have jurisdiction over the children.

8. The Court is going to keep emergency jurisdiction over the children until some other court says "I have jurisdiction over the children and I will relinquish you of that responsibility." The two judges from the State of Texas and Norway need to talk to each other and decide who has jurisdiction. The victor court will call this Court and advise of the jurisdictional decision. This Court will then relinquish jurisdiction. This Court will return the children to the State of Texas until it receives the call from Texas or Norway. The court with jurisdiction needs to sign an order, cosigned by the other court, and this Court must receive the countersigned order before it releases jurisdiction. This Court will retain the children's passports and will return Mr. and Mrs. Vaile's individual passports. The children are not to be shuttled continually back and forth between Texas and Norway. Whatever visitation Ms. Vaile

wants, she can have while the children reside in Texas with Mr. Vaile. This subject matter jurisdiction on behalf of the children is not waivable. The parties have to start a custody and visitation decision "from scratch." What they have now is a contract, but this Court cannot say what to do with the children.

The Court having been fully advised in the premises, and good cause appearing therefore:

IT IS HEREBY ORDERED the Defendant's *MOTION TO SET ASIDE FRAUDULENTLY OBTAINED DIVORCE OR IN THE ALTERNATIVE, SET ASIDE ORDERS ENTERED ON APRIL 12, 2000, AND REHEAR THE MATTER, AND FOR ATTORNEY'S FEES AND COSTS* is DENIED and the Court makes no Hague Convention determination on the Defendant's *MOTION FOR IMMEDIATE RETURN OF INTERNATIONALLY ABDUCTED CHILDREN.*

IT IS FURTHER ORDERED that the children are to be returned to Texas in the custody of Plaintiff, Scotland Vaile, on October 25, 2000. That the children's passports will remain in the Custody of this Court until a court of competent jurisdiction issues an order regarding custody of the children. The passports of the Plaintiff and the Defendant, Cisilie Vaile, will be immediately returned by the Court.

IT IS FURTHER ORDERED that Defendant, Cisilie Vaile, is awarded liberal visitation with the children while Defendant is in Las Vegas, until October 25, 2000, and then later in Texas while this Court awaits word from another court that will assert jurisdiction over the children.

IT IS FURTHER ORDERED that the children shall remain in Plaintiff's temporary custody in Texas until this Court receives and [sic] Order from whichever court is deemed to have jurisdiction over the children.

DATED and DONE this 25th day of October 2000.

/s/ CYNTHIA "VANNE STEEL"
District Court Judge

Respectfully Submitted By:

DEMPSEY, ROBERTS & SMITH, LTD.

By: /s/ F. Dempsey
JOSEPH F. DEMPSEY, ESQ.
Nevada Bar No. 4585
DEMPSEY, ROBERTS & SMITH, LTD.
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Attorney for Plaintiff
R. SCOTLUND VAILE

Approved as to Form and Content by:

LAW OFFICE OF MARSHAL S. WILLICK, P.C.

By: /s/ Robert Cerceo
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CISILIE A. VAILE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEVADA

CISILIE A. VAILE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, FAMILY COURT DIVISION, Respondents, and R. SCOTLUND VAILE, Real Party in Interest.	No. 36969 (Filed Sep. 5, 2002)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Young, J.
Young

/s/ Agosti, J.
Agosti

/s/ Rose, J
Rose

/s/ Leavitt, J.
Leavitt

/s/ Becker, J.
Becker

We dissent:

/s/ Maupin, C.J.
Maupin

/s/ Shearing, J.
Shearing

cc: Hon. Cynthia Dianne Steel, District Judge, Family Court Division
Marshal S. Willick
Rawlings Olson Cannon Gormley & Desruisseaux
Clark County Clerk

APPENDIX E

51 Fed. Reg. 10,493

Appendix A

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *October 30, 1985.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a certified copy of the Hague Convention on the Civil Aspects of International Child Abduction, adopted on October 24, 1980 by the Fourteenth Session of the Hague Conference on Private International Law and opened for signature on October 25, 1980.

The Convention is designed to secure the prompt return of children who have been abducted from their country of habitual residence or wrongfully retained outside that country. It also seeks to facilitate the exercise of visitation rights across international borders. The Convention reflects a worldwide concern about the harmful effects on children of parental kidnapping and a strong desire to fashion an effective deterrent to such conduct.

The Convention's approach to the problem of international child abduction is a simple one. The Convention is designed promptly to restore the factual situation that existed prior to a child's removal or retention. It does not seek to settle disputes about legal custody rights, nor does it depend upon the existence of court orders as a condition for returning children. The international abductor is denied legal advantage from the abduction to or retention in the country where the child is located, as resort to the Convention is to effect the child's swift return to his or her

circumstances before the abduction or retention. In most cases this will mean return to the country of the child's habitual residence where any dispute about custody rights can be heard and settled.

The Convention calls for the establishment of a Central Authority in every Contracting State to assist applicants in securing the return of their children or in exercising their custody or visitation rights, and to cooperate and coordinate with their counterparts in other countries toward these ends. Moreover, the Convention establishes a judicial remedy in wrongful removal or retention cases which permits an aggrieved parent to seek a court order for the prompt return of the child when voluntary agreement cannot be achieved. An aggrieved parent may pursue both of these courses of action or seek a judicial remedy directly without involving the Central Authority of the country where the child is located.

The Convention would represent an important addition to the State and Federal laws currently in effect in the United States that are designed to combat parental kidnapping – specifically, the Uniform Child Custody Jurisdiction Act now in effect in every State in the country, the Parental Kidnapping Prevention Act of 1980, the 1982 Missing Children Act and the Missing Children's Assistance Act. It would significantly improve the chances a parent in the United States has of recovering a child from a foreign Contracting State. It also provides a clear-cut method for parents abroad to apply for the return of children who have been wrongfully taken to or retained in this country. In short, by establishing a legal right and streamlined procedures for the prompt return of internationally abducted children, the Convention should remove many of the uncertainties and the legal difficulties that

now confront parents in international child abduction cases.

Federal legislation will be submitted to provide for the smooth implementation of the Convention within the United States. This legislation will be consistent with the spirit and intent of recent congressional initiatives dealing with the problem of interstate child abduction and missing children.

United States ratification of the Convention is supported by the American Bar Association. The authorities of many States have indicated a willingness to do their part to assist the Federal government in carrying out the mandates of the Convention.

I recommend that the Senate give early and favorable consideration to the Convention and accord its advice and consent to ratification, subject to the reservations described in the accompanying report of the Secretary of State.

RONALD REAGAN.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE, *Washington, October 4, 1985.*

The PRESIDENT, *The White House.*

THE PRESIDENT: I have the honor to submit to you the Hague Convention on the Civil Aspects of International Child Abduction with the recommendation that it be transmitted to the Senate for its advice and consent to ratification.

The Convention was adopted on October 24, 1980 at the Fourteenth Session of the Hague Conference on Private International Law in Plenary Session by unanimous vote of twenty-three member states of that organization. The Convention was opened for signature on October 25, 1980, at which time it was signed by Canada, France, Greece and Switzerland. It was signed on behalf of the United States on December 23, 1981, and has also been signed by Belgium and Portugal. The Convention is in force for France, Portugal, Switzerland and most parts of Canada.

The Convention stemmed from a proposal first advanced at a Hague Conference Special Commission meeting in 1976 that the Conference prepare a treaty responsive to the global problem of international child abduction. The overriding objective was to spare children the detrimental emotional effects associated with transnational parental kidnapping.

The Convention establishes a system of administrative and legal procedures to bring about the prompt return of children who are wrongfully removed to or retained in a Contracting State. A removal or retention is wrongful within the meaning of the Convention if it violates custody rights that are defined in an agreement or court order, or that arise by operation of law, provided these rights are actually exercised (Article 3), i.e., custody has not in effect been abandoned. The Convention applies to abductions that occur both before and after issuance of custody decrees, as well as abductions by a joint custodian (Article 3). Thus, a custody decree is not a pre-requisite to invoking the Convention with a view to securing the child's return. By promptly restoring the *status quo ante,* subject to express requirements and exceptions, the Convention

seeks to deny the abductor legal advantage in the country to which the child has been taken, as the courts of that country are under a treaty obligation to return the child without conducting legal proceedings on the merits of the underlying conflicting custody claims.

Each country must establish at least one national Central Authority primarily to process incoming and outgoing requests for assistance in securing the return of a child or the exercise of visitation rights (Article 6). In the United States the Central Authority is to be located in an existing agency of the federal government which will, however, need to rely on state and local facilities, including the Federal Parent Locator Service and the private bar, in carrying out the measures listed in Article 7 of the Convention. These meassures [sic] include best efforts to locate abducted or retained children, explore possibilities for their voluntary return, facilitate provision of legal services in connection with judicial proceedings, and coordinate arrangements for the child's return travel (Article 7).

Articles 11-17 are the major provisions governing legal proceedings for the return of an abducted child. Under the Convention, if a proceeding is brought less than a year from the date of the removal or retention and the court finds that the conduct was wrongful, the court is under a treaty obligation to order the child returned. When proceedings are brought a year or more after the date of the removal or retention, the court is still obligated to order the child returned unless the person resisting return demonstrates that the child is settled in the new environment (Article 12).

Althoug15h [sic] the Convention ceases to apply as soon as a child reaches sixteen years of age (Article 4), it does not

limit the power of appropriate authorities to order the return of an abducted or wrongfully retained child at any time pursuant to other laws or procedures that may make return in the absence of a treaty obligation possible (Article 18).

Articles 13 and 20 enumerate those exceptional circumstances under which the court is not obligated by the Convention to order the child returned. The person opposing return of the child bears the burden of proving that: (1) custody rights were not actually being exercised at the time of the removal or retention by the person seeking return or the person seeking return had consented to or subsequently acquiesced in the removal or retention; or (2) there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. A court also has discretion to refuse to order a child returned if it finds that the child objects to being returned and has reached an age or degree of maturity making it appropriate to consider his or her views (Article 13). A court may also deny a request to return a child if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (Article 20). Unless one of the enumerated exceptions to the return obligation is deemed to apply, courts in Contracting States will be under a treaty obligation to order a child returned.

Visitation rights are also protected by the Convention, but to a lesser extent than custody rights (Article 21). The remedies for breach of the "access rights" of the non-custodial parent do not include the return remedy provided by Article 12. However, the non-custodial parent may apply to the Central Authority under Article 21 for

"organizing or securing the effective exercise of rights of access." The Central Authority is to promote the peaceful enjoyment of these rights. The Convention is supportive of the exercise of visitation rights, i.e., visits of children with non-custodial parents, by providing for the prompt return of children if the non-custodial parent should seek to retain them beyond the end of the visitation period. In this way the Convention seeks to address the major concern of a custodial parent about permitting a child to visit the non-custodial parent abroad.

If the Convention machinery succeeds in rapidly restoring children to their pre-abduction or pre-retention circumstances, it will have the desirable effect of deterring parental kidnapping, as the legal and other incentives for wrongful removal or retention will have been eliminated. Indeed, while it is hoped that the Convention will be effective in returning children in individual cases, the full extent of its success may never by quantifiable as an untold number of potential parental kidnappings may have been deterred.

This country's participation in the development of the Convention was a logical extension of U.S. membership in the Hague Conference on Private International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population. In response to the public outcry over parental kidnapping, all states and the District of Columbia enacted the Uniform Child Custody Jurisdiction Act (UCCJA), and Congress has enacted the Parental Kidnapping Prevention Act (PKPA), the Missing Children Act, and the Missing Children's Assistance Act. These statutes address almost exclusively problems associated with inter-state parental kidnapping.

The Convention will expand the remedies available to victims of parental kidnapping from or to the United States.

The Convention will be of great assistance to parents in the United States whose children are wrongfully taken to or retained in other Contracting States. Such persons now have no choice but to utilize laws and procedures applicable to recognition and enforcement of foreign custody decrees in the country in which the child is located. It is often necessary to retain a foreign lawyer and to apply or reapply for custody to a foreign court, which typically pits the U.S. petitioner against the abducting parent who may have his or her origins in that foreign country and may thus have the benefit of defending the custody suit in what may be a friendly forum. The Convention will be especially meaningful to parents whose children are abducted before U.S. custody orders have been issued because return proceedings under the Convention are not contingent upon the existence of such orders.

At any given time during the past several years, about half of the several hundred requests to the Department of State for assistance in recovering children taken out of the United States have involved abductions to countries which participated in the preparation and negotiation of the Hague Convention. This suggests that U.S. ratification of the Convention, and its ultimate ratification by many of those other countries, is likely to benefit a substantial number of future victim children and parents residing in the United States.

For parents residing outside the United States whose children have been wrongfully taken to or retained in this country, the Convention will likewise serve as a vehicle for

prompt return. In such cases involving violations of existing foreign court orders, the victim parent outside the United States may either invoke the Convention or seek return of the child in connection with an action for recognition of the foreign custody decree pursuant to the UCCJA or other available means. The Convention will be expecially [sic] advantageous in pre-decree abduction cases where no court order exists that may be enforced under the UCCJA.

The Convention has received widespread support. The Secretary of State's Advisory Committee on Private International Law – on which ten major national legal organizations interested in international efforts to unify private law are represented – has endorsed the Convention for U.S. ratification. The House of Delegates of the American Bar Association adopted a resolution in February, 1981 urging U.S. signature and ratification of the Convention. U.S. ratification is also supported by the Department of Justice and the Department of Health Services. In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.

The Department believes that federal legislation will be needed fully to give effect to various provisions of the Convention. Draft legislation is being prepared for introduction in both houses of Congress. The United States instrument of ratification would be deposited only after satisfactory legislation has been enacted.

I recommend that the United States enter two reservations at the time of deposit of its instrument of ratification, both of which are specifically permitted by the Convention.

(1) The United States should enter a reservation to ensure that all documents sent to the U.S. Central Authority in a foreign language are accompanied by a translation into English. The reservation should read:

> Pursuant to the second paragraph of Article 24, and Article 42, the United States makes the following reservation: All applications, communications and other documents sent to the United States Central Authority should be accompanied by their translation into English.

(2) The second reservation should read:

Pursuant to the third paragraph of Article 26, the United States declares that it will not be bound to assume any costs or expenses resulting from the participation of legal counsel or advisers or from court and legal proceedings in connection with efforts to return children from the United States pursuant to the Convention except insofar as those costs or expenses are covered by a legal aid program.

It is hoped that the Senate will promptly consider this Convention and give its advice and consent to its ratification by the United States.

Respectfully submitted,

GEORGE P. SHULTZ.